No. 11936

In The United States Court of Appeals
For the Ninth Circuit

WILLAPOINT OYSTERS, INC., *Petitioner*
vs.
OSCAR R. EWING, Administrator, and J. DONALD KINGSLEY, Acting Administrator, FEDERAL SECURITY AGENCY, FOOD AND DRUG ADMINISTRATION, *Respondents.*

REPLY BRIEF OF PETITIONER

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Dated: December 29, 1948.

THE ARGUS PRESS, SEATTLE

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REPLY BRIEF OF PETITIONER

I. THE BASIC ISSUES PRESENTED

This court is empowered for good cause to set aside the two instant orders of the Federal Security Administrator and of the Acting Administrator, because:

(a) the findings of fact in said orders are arrived at by accepting part of the evidence and totally disregarding other convincing evidence;

(b) the evidence upon which the findings purport to rely was changed and modified by cross-examination and shown to be incorrect by other admitted and established facts which were ignored;

(c) these findings and the orders involved the necessity of making a "choice" as to which witnesses "should be believed";

(d) the respondents did not make such choice, or see and hear the evidence, but instead they delegated the task of making such "choice" as to which witnesses "should be believed" and the preparation of findings to two subordinate employees whose opinions were necessarily biased;

(e) these two subordinates were, respectively:

(1) respondents' chief enforcement officer who had given the principal testimony in

support of respondents, and who also had been permitted by respondents' Presiding Officer to cross-examine industry witnesses extensively in an effort to impeach their opposing evidence; and

(2) respondents' attorney, who likewise participated extensively in such cross-examination, and who had "buried himself in one side" of the case and was accordingly "disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions";

(f) the Presiding Officer sustained objections to cross-examination by petitioner's counsel into the existence of these prejudicial practices, and rejected, even before its completion, an offer of proof to establish the same; and

(g) neither of the respondents fulfilled his official duty to address himself personally to the evidence at both the first and second hearings, and upon all of that evidence conscientiously to reach conclusions.

Each of these deficiencies in the two orders is included in the detailed Specifications of Error and Argument sections of Petitioners' Opening Brief.

II. RESPONDENTS AVOID THE ISSUES[1]

Respondents' brief[2] makes three principal contentions:

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[1]Respondents have not answered or otherwise challenged the allegations of the original or amended petitions for judicial review filed herein, nor countered many of the specifications of error. They rely solely upon the text of the orders and upon their brief.

[2]Reference abbreviations conform to style shown in Petitioner's Opening Brief, page 5, herein identified as "Pet. Op. Br." Its Specifications of Error Nos. 1 to 59 and Appendices A to F therein are noted,

(a) that petitioner's argument goes to the weight of the evidence and that "it was for the Administrator to *resolve any conflicts* in the evidence *and* to *decide whether* the testimony of *witnesses* * * * *should be believed.*" (Resp. Br. 33);

(b) that under the "substantial evidence" rule, the "*choice* of the Administrator is valid" even if petitioner's product is "driven from the market" (Resp. Br. 45); and

(c) that neither the *Morgan* cases (298 U.S. 468; 304 U.S. 1), nor the Administrative Procedure Act, nor the Constitution, impose any "rudiments of fair play" or similar restraints of "judicial due process" on respondents, because they are engaged in "rule-making" which can not be "infected" with such procedural errors (Resp. Br. 49, 55, and 57).

But the Administrator and the Acting Administrator did not in fact "resolve any conflicts." Instead, their subordinate officers and employees, engaged in the performance of investigative and prosecuting functions in connection with these very matters, prepared the findings. They ignored much of the evidence (Pet. Op. Br. 79-90), and concluded what testimony "should be believed" and what "choice" should be made. This is not cured by respondents' subsequent signatures. Respondents' brief rejects the cases and authorities which condemn such practices (Resp. Br. 52-62).

III. CONGRESS AND THE COURTS REQUIRE THAT THE ADMINISTRATOR PRESERVE JUDICIAL DUE PROCESS IN SUCH ADVERSARY PROCEEDINGS.

The elaborate provisions of Section 701(e) of the

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respectively as "Spec. —" and as "Pet. App. —." The Brief of Respondents is identified as "Resp. Br." and its Appendices A to D as "Resp. App.—." Emphasis supplied unless otherwise shown.

Federal Food, Drug, and Cosmetic Act specify detailed requirements for formal hearings under the Act. The unusually broad terms of Section 701(f) similarly spell out provisions for judicial review. But this statute has scant real significance if respondents' contentions be true.

Respondents' contentions are contrary to Congressional intent. Chairman Lea of the House Committee reporting the Act stated that Section 701(e) was drafted:

> "before the Supreme Court made its famous decision in the (second) *Morgan* case (304 U.S. 1), but it, in substance, provides that the legislative agency shall do the very things that the Supreme Court said they should do in the *Morgan* case." 83 Cong. Rec. 9096 (1938).

Referring to judicial review, the Chairman stated:

> "* * * We give more authority * * * under this bill than any white man ought to have unless with it there is proper restraint by the courts. That is what we have tried to do here." 83 Cong. Rec. 7776 (1938) (Pet. Op. Br. 90).

And more recently, these same manifestations of Congressional intent have been implemented by the Administrative Procedure Act (Pet. Op. Br. 13-17; Cf. 81-85).

It is submitted that Congress and the federal courts demand a vigilance to prevent "administrative discretion" from becoming a vehicle for overriding the laws which Congress has enacted.[3]

IV. RESPONDENTS' BRIEF MISCONCEIVES MANY DETERMINATIVE FACTS.

Within permissible space limitations we shall point out some of the manifest errors in respondents' brief,

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[3]Pet. Op. Br. 75, *et seq.;* cf. Douglas, J. dissenting, *I.C.C. v. Parker*, 326 U.S. 60, 75 (1945).

following substantially the sequence of its arrangement. It would unduly burden this brief to repeat here contentions heretofore made in our opening brief.[4]

A. Errors in Respondents' Treatment of "Jurisdiction" (Resp. Br. 1, 3, 53-6).

1. Respondents contend that the order is "rule-making" and as such virtually free from judicial review. They disregard Supreme Court cases which have rejected such theoretical distinctions based on the "form" of administrative orders (Pet. Op. Br. 81-3).

Respondents quote from the *Quaker Oats Case* with respect to "*rule-making*" (Resp. Br. 53), but discount their own earlier quotation from this case (Resp. Br. 43), which holds that the judicial review provisions:

> "were patterned after those which Congress had provided for the review of '*quasi-judicial orders*' of the Federal Trade Commission and other agencies."

The instant case arose from charges of "unfair competition" brought by Southern canners (Callaway, R. 64). As such it closely resembles the "*quasi-judicial orders*" of the Federal Trade Commission. The instant proceeding was intensely "adversary" in character (Resp. Br. 56). It is not immune from

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[4]It should be noted that while respondents take scattered exception to many of petitioner's specifications of error, they appear to have completely ignored and hence, by implication, to admit Specifications Nos. 3(a), 4(a) and (b), 5(a) (c) (d) (e) and (h), 9, 10, 11, 13, 14, 15, 16, 19, 20, 21, 29, 30, 31, 34, 35, 37, 39, 41, 45, 52, 55, and 57; and to have omitted to answer or comment on much that is alleged in other of the remaining specifications to which they make but passing reference.

review to determine whether the "rudiments of fair play" were accorded petitioner (Pet. Op. Br. 79-90).

2. Respondents state that the second order of respondent Kingsley:

> "did not change the findings previously made (by respondent Ewing) but were supplementary thereto" (Resp. Br. 2),

and then contend that the *Morgan* cases are not applicable (Resp. Br. 49, 51, 61).

But the very first finding of respondent Kingsley states that respondent Ewing's prior finding "*is modified*" in substantial respects (Pet. App. B, p. 15). Respondents themselves later acknowledge such "*modifications*" (Resp. Br. 9, n. 2). Still later, respondents seek to justify respondent Kingsley's failure to *modify* another of respondent Ewing's findings (Spec. 27) on the grounds that the evidence at the second hearing was "not in the record" when the first findings were made (Resp. Br. 27). Thus, at one point, respondents claim *modification* because evidence *was given at* the second hearing, and at another they disclaim *modification* because evidence *was not given until* the second hearing.

Respondents quote from a portion of this court's first order directing a remand to take additional evidence (Resp. Br. 8), but they omit to point out that in said order this court expressly provided:

> "that *the Administrator, after considering said evidence*, may *modify* his findings as to the facts, or make new findings by reason of the additional evidence so taken, and he shall file such *modified* or new findings, and his recommendations, if any, for the *modification* or setting aside of his original order, with the return of such additional evidence."

Respondents ignore their legal duty to consider the evidence in its entirety (Pet. Op. Br. 77-8).

3. Respondents contend that the:

> "Administrative Procedure Act does not affect the court's jurisdiction * * *" (Resp. Br. 2).

This is directly contrary to the law and to its legislative history (Pet. Op. Br. 81-5).

This amazing contention will certainly shock the distinguished Chairman of the Senate Committee on the Judiciary who, leading a unanimous Senate to adopt the measure, believed it prescribed basic criteria of *administrative fair play* for all types of administrative orders and conferred jurisdiction upon the courts to enforce such requirements. See *Administrative Procedure Act, Legislative History*, 79th Cong. 2d Sess., S. Doc. 248, pp. 324-6; also McCarran, *Improving Administrative Justice* (Dec. 1946) 32 A.B.A.J. 827, 893-4; and McCarran, *Regulatory Government*, (Nov. 1948) 34 A.B.A.J. 1005, 1007-8.

B. Errors in Respondents' "Statement of the Case" (Resp. Br. 3-10).

1. Respondents disparage in their brief the validity of their own long-continued requirements for a 5 ounce drained weight, and state:

> "The Food Inspection Decisions * * * *are in no sense standards* of fill * * *." (Resp. Br. 3)

But six months earlier, in this very proceeding, respondents tendered to this court an affidavit of the Federal Commissioner of Food and Drugs, which stated:

> "a drained or cut-out weight of 5 ounces of oysters * * * *was* in accordance with *an advisory standard established under the Food and Drug Act* of 1906." (Dunbar Affidavit, filed herein by respondents June 3, 1948, page 3, lines 21-3).

As recently as 1943 the Supreme Court so recognized these standards. *Security Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233, n. 8.

The full text of pertinent advisory standards are shown in our brief (Pet. App. D). They expressly fixed the 5 ounce drained weight. They are referred to in Findings 1 and 2 of respondents' own Ex. 3 in this case (the 1944 order, reprinted, Pet. App. C, 25-6). The Administrator recognized such conformity with this 5 ounce standard in Finding 12 of his 1944 order (Pet. App. C, 29).

2. Respondents suggest that the change is not precipitous, and that the 1942 Tin Conservation Order M-81 was based on respondents' experimental work "made available to WPB" (Resp. Br. 4). That statement, if true, does not appear to be in the record. Moreover, two years later in 1944, respondent found that:

> "Very little experimental work has been done by the Administration on Pacific Coast canned oysters, the principal reason being that none have been packed there since 1942" (Pet. App. C, 28).

3. Respondents recognize that in April 1948 petitioner protested against the discriminatory requirement to change their label to "Pacific Oysters" and sought to have the order modified before it became effective. But respondents now contend that no further evidence was offered by petitioner on this point at the second hearing (Resp. Br. 5).

Respondents omit to note that they had denied the April, 1948, petition and that their Presiding Officer's ruling limited evidence at the second hearing solely to the new blanching process, thereby precluding petitioner from offering further evidence on the issue of "common or usual name so far as practicable" (R. 705, 725).

However, at the second hearing respondents offered petitioner's label in evidence and by cross-examination confirmed that petitioner's canned oysters have been continuously for more than 16 years labeled as

"OYSTERS" and not as "PACIFIC OYSTERS" (Ex. 31, R. 755, 759).

4. Respondents improperly summarize the effect of Finding 5 by omitting its reference to the matter of labels showing total weight rather than drained weight (Resp. Br. 6; Pet. App. A, 8-9).

An advisory standard effective since 1923 states:

> *No. 379. "Declaration of net weight on canned clams and canned oysters.—Because the liquid packing medium in* canned clams and *canned oysters has* a certain *food value and is* ordinarily *utilized as food, no objection will be made to marking the net weight of these products in terms of total weight, liquid included."* (Pet. App. D, 40).

Nothing in either of the two challenged orders alters this permission. Nor have respondents otherwise exercised their authority under the provisions of the Act to revoke the long-continued permission granted by Opinion No. 379. Accordingly, both methods of showing weight have been followed. But the only Western label of record in the first hearing shows "Contents 5-ounces Oyster Meat" (R. 634). Petitioner's labels showed "net weight in terms of total weight" (Ex. 31).

But, responsive to the oral suggestion made by a member of this court at its first hearing in June 1948, petitioner voluntarily imprinted, immediately thereafter, on all of its labels the *additional* bold face type:

"NET DRAINED WT.
5 OZ. OYSTER MEAT"

Its cans, accordingly, now show both the permissible "net weight in terms of total weight" and the "drained weight." This gives the fullest possible information to consumers (R. 755, 759).[5]

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[5]See verified Motion for Order Granting Permanent Injunction and Continuing Stay, page 10, filed herein August 19, 1948.

But respondents did not modify Finding 5 to reflect this further evidence. Instead, Finding 5 continues to state:

> "The canned Pacific oysters were often labeled to show the total weight of oysters and liquid in the can but not the drained weight of oysters."

Finding 5 then refers to certain hearsay testimony as to the views of wholesalers, retailers, and purchasers (Pet. Op. Br. 94-5). It then states:

> "*This* is a *condition* likely to confuse and deceive customers."

But such finding does not show to which antecedent "condition" the word "this" refers. It is not the "detailed finding of fact" required by Section 701(e) of the Act. It is impossible to determine on what "condition" the conclusion of Finding 5 is based. In *U.S. v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510-11 (1935), the court annulled a "rule-making" order, stating:

> "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency * * *. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. *In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency.* (Citing cases.) We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

5. Respondents contend that there is no resultant quality impairment in a 6½ ounce fill (Resp. Br. 6). This is directly contrary to the substantial evidence of record, including changes made by witnesses for

respondents on cross-examination which modified their prior testimony, and which was ignored. This relates primarily to browning of oysters and to other disfigurations impairing quality and appearance. It has been so fully discussed heretofore that it needs no further comment (Pet. Op. Br. 96-100, *passim*).

6. Respondents seek to disparage the evidence offered by petitioner at the second hearing held on 20 days' notice in Washington, D. C. (Resp. Br. 7-8), and to justify their own discretion as to the time and place of the hearing (Resp. Br. 67).

The truth is that petitioner's evidence consisted of its oral testimony and of Exhibits 25 to 30, which contain eleven affidavits with respect to: (a) the blanching process and test packs of overfilled cans; (b) reports on scientific examinations showing resultant quality impairment of a test pack of 24 cans of oysters which were intentionally overpacked by respondents' inspector; (c) detailed scientific volume studies of raw oysters as affected by blanching and by presteaming processes; (d) separate food quality reports by each of the participating members of a Food Panel assembled to evaluate the quality of various types of identified canned oysters; (e) report on scientific analyses of liquid and protein and solid in various identified types of canned oysters; and (f) a chemical analysis showing that the food value of the liquid packing medium (exclusive of the oysters) in cans of Willapoint Oysters compared favorably with the food value of the *total* food content of cans of other well known products.

It is respectfully urged that such oral testimony and affidavits be reviewed by this court to determine whether they deserve the deprecating comments made by respondents, or whether they are substantial evidence which respondents chose to ignore.

7. Respondents contend that:

> "Pacific oysters canned after blanching are no better than those canned after pre-steaming." (Resp. Br. 10)

This is directly *contrary* to the evidence, including the *only consumer evidence of record.* Ex. 28 is the detailed report of a Consumer Food Acceptance Test Panel conducted by trained and impartial observers of canned Southern oysters and of steamed and blanched canned Western oysters. It was completely ignored.

A witness for respondents testified that respondents had intended to offer the results of a similar consumer food acceptance panel, but explained:

> "because of the shortage of time I was not able to get the panel together." (R. 1105)

Thus at one point respondents reprove petitioner for the quality of its evidence assembled within twenty days, but at another point respondents excuse their own omission to offer one single item of probative consumer evidence at either hearing as due to "the shortage of time."

Respondents apparently seek to explain the haste as due to this court's order for further hearing and report within two 30 day periods, respectively (Resp. Br. 8). But they omit to note this court's express authorization that:

> "either 30 day period may be extended by the court upon representation by the *Administrator* that a longer period is needed for the proper discharge of his duties * * *." (C.C.A. Order, June 8, 1948, p. 3-4).

8. Respondents contend (Resp. Br. 10) that a lighter drained weight permits a canner to replace "two ounces of oysters with two ounces of water." Respondents omit to state that (a) Western oysters have always been canned, since 1928, at the lawful 5 ounce drained weight pursuant to Food and Drug Advisory

Standards (R. 64), or (b) that Southern oysters had been voluntarily canned at a 7½ ounce drained weight beginning in 1942 (R. 550).

Respondents also disregard the fact that their present orders rescind their prior 1944 order (Pet. App. C). The 1944 order established that the voluntarily adopted 7½ ounce drained weight for Southern oysters was reasonable for that species or size. But the 1948 orders would prescribe a 6½ ounce drained weight for all canned species and sizes, regardless of biological differences and regardless of packing methods.

Thus it is respondents who, by the new orders, would affirmatively permit Southern producers "to replace an ounce of oysters with an ounce of water."

9. Respondents state that the liquid drained from canned oysters is much less valuable than oyster meat (Resp. Br. 10). Respondents ignore basic distinctions between the Western and the Southern species and packing methods, as set forth in Finding 9 of their 1944 order (Pet. App. C, 28):

> "In general, Pacific Coast canneries do not steam to the same extent as Atlantic and Gulf canneries. *In Atlantic and Gulf packed oysters there is usually a slight gain in weight* during processing *in the can, whereas in Pacific packed oysters a considerable part of the total shrinkage takes place in the processing with a consequent loss of weight.*"

Respondents omit to note that, since Southern oysters usually "gain in weight" in the can, the Southern liquid of necessity consists chiefly of the identical brine in which they are packed; whereas, since Western oysters during processing in the can exude their own body content into the brine packing medium, with a "consequent loss of weight," the resultant Western packing medium becomes a nectar of the natural ingredi-

ents of the oyster, admixed with the packing medium, and having a high food value (Kincaid, R. 167-70).

Respondents thus confuse the two entirely different processes and ignore Dr. Charlton's report which showed that:

> "the liquid portion of Willapoint canned oysters has a significant food value quite comparable to the entire contents of other well-known canned foods." (Ex. 30).

10. Respondents conclude on these false premises that:

> "The *put-in weight* of oysters, therefore, is not an accurate measure of fill of container and would be only if all oysters were pre-cooked to the same degree before weighing into the cans." (Resp. Br. 10).

Respondents later refer to the Administrator's order with respect to canned peaches (Resp. Br. 18, n. 3; Callaway, R. 484), but do not point out that the Administrator there prescribed the very *put-in weight* method which is now opposed in the oyster case, although the reasons stated therein are substantially identical (Spec. 45). In the *Canned Peaches* case, 4 F.R. 4920; 7 F.R. 1612; 1 C.C.H. *Food,Drug, Cosmetic Law Reporter*, Para. 2139 at 2141, the Administrator said:

> "1. *The quantity* * * * which can be placed in a container *varies, depending* upon the *method of packing and* upon *the shape, size*, degree of *maturity, and specific gravity* of the units * * *.
> "2. With the exception of comparatively few slack filled cans, *canned peaches* * * * *contain the maximum quantity* * * * *which*, using reasonably good factory practice, *can be placed and sealed* in each can *and processed by heat* to prevent spoilage, *without crushing or breaking* the peach units.
> "3. *The maximum quantity* * * * *varies, depending on* the size of the container, the *method of packing*, the *form, size, firmness* of units, the *nec-*

essity for having sufficient liquid to insure proper processing, and other factors.

"4. The can should contain the greatest number of peach units the canner can place therein and properly seal and process.

"5. * * * canners know the greatest amount of peach units which can be placed in a can of any given size without damage, and canners employ inspectors to insure proper filling by packers.

"6. *None of the various methods* which have been studied for objective measurements of fill *have shown any uniform correlation between* the quantity of peach units *put in and* the quantity of peach units *cut out. Assurance to the consumer* of a can full of peaches *can be obtained only by a requirement as to the quantity put in* the container."[6]

V. RESPONDENTS' ARGUMENT MISCONSTRUES THE EVIDENCE AND THE LAW.

1. Respondents contend in their argument that petitioner has not indicated any findings which are not supported by substantial evidence (Resp. Br. 14). Respondents misconceive a major portion of petitioner's brief, including Specifications 6 to 50, inclusive (Pet. Op. Br. 54-72), and the argument in support thereof (Pet. Op. Br. 91-116).

2. Respondents assert that all of the evidence supports Finding No. 1 that the species *ostrea gigas* is commonly known as "Pacific Oysters" when canned (Resp. Br. 14-18). This is not correct. Petitioner has shown respondents' manifest error in construing

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[6]Substantially identical *put-in weight* requirements obtain as to many other canned products, including canned apricots, 5 F.R. 93, 7 F.R. 1612, 1 C.C.H. Para. 2153 at 2155; canned cherries, 5 F.R. 98, 2399, 7 F.R. 1612, 1 C.C.H. Para. 2163 at 2165; canned pears, 5 F.R. 102, 7 F.R. 1612, 1 C.C.H. Para 2175 at 2177.

the evidence and the injustice of requiring petitioner to change its "common or usual name" (Pet. Op. Br. 111-13).

Respondents rely on the *Twin City Case* and the *Columbia Cheese Case* (Resp. Br. 17). But these cases turn on substantial evidence, which is lacking in this case.

Moreover, the "finding" does not satisfy the required legal standard of a "detailed finding of fact" in prescribing that the "common or usual name so far as practicable" of **"OYSTERS"** must now be abandoned by petitioner after more than 16 years of accepted usage, and a new one now adopted (Pet. Op. Br. 116).

Respondents also rely on their order with respect to canned peaches (Resp. Br. 18, n. 3). It will be noted that the Administrator did not expropriate the generic word **"PEACHES"** to any particular variety or to any exclusive geographical section, but required only that each *and every* species be appropriately described as a "type of **PEACHES**." Petitioner asks no more here.

If Southern oysters were *required* to be appropriately described as "**COVE OYSTERS**", as Western oysters are *required* to be described as "**PACIFIC OYSTERS**" (or any of the other alternative terms common to each were required), petitioner would not complain.

But petitioner with good cause does strenuously protest when the Southern area of the oyster industry unlike *any* area of the peach industry, would by this order receive a new and exclusive use of the generic term "canned **OYSTERS**", while petitioner is compelled to abandon its continuous lawful use of this identical generic term for more than 16 years (Ex. 31, R. 755, 759).

3. Respondents contend that there is substantial evidence to support a 6½ ounce drained weight requirement without quality or appearance impairment (Resp. Br. 18-39).

This argument begins with a statement, not of record, with respect to an alleged fundamental principle that in non-transparent containers, it is common knowledge that the customer will choose the largest except for price considerations (Resp. Br. 18).

Rather than departing from the record, respondents should have concluded that, as in the case of many canned products, consumers seek first of all quality and natural flavor resembling the fresh product (R. 605), which all canners agree is superior when fresh-opened oysters are canned under favorable conditions in their natural liquids rather than when dehydrated and canned (R. 46; 453-5; 554-5; 717-725).

Respondents have ignored the evidence as to effect of over-fill on quality and appearance (R. 527, 662, *passim*). Browning is the most serious defect resulting from overpacking (R. 731; see Pet. Op. Br. 96-110). It ranges from a faint tinge of yellow-brown to the brown color of a Philip Morris cigarette package (R. 332; 666-9). It ranges from a very slight to heavy browning (Rowe, R. 666-9). Contrary to respondents' statement that no browning resulted (Resp. Br. 21), serious browning did result and there is serious difficulty in packing the heavier fills (Pet. Op. Br. 96-100). Increased twisting, pressure marks, and breakage also result (Ex. 14, 15, 16, 27). The difficulties of filling to a 6½ ounce fill of Western oysters are graphically illustrated by photographs of record in this case (Ex. 37), and by improperly rejected Ex. 39 (Quoted in full text, Pet. App. F, 55-61; See Spec. 5(f)).

Respondents refer to certain charts appended to

their brief (Resp. Br. 23, 32; Resp. App. A to D). Petitioner has analyzed these Appendices and comments: First, that these charts are not in the record, but apparently made from work sheets, the absence of which is complained of herein (Pet. Op. Br. 100-102); second, if purportedly taken from unidentifiable data of record, these charts are grossly inaccurate; and third, that these charts utterly disregard and give no weight to respondents' own testimony as to varying degrees of browning (R. 913-5).

It is the qualitative appraisal of browning that is of greatest importance in this case. Respondents brush aside the inconsistencies in their own Ex. 33. Respondents ignore the contradictory evidence of Mr. Callaway with respect to degrees of browning (Pet. Op. Br. 97-100) on the ground that it goes "to the weight of the evidence and not to its admissibility" (Resp. Br. 33).

4. Respondents contend that it was the duty of the Administrator to "resolve any conflicts in the evidence and to decide whether the testimony of witnesses who appeared at the hearing should be believed" (Resp. Br. 33).

It is this insistence by respondents that the Administrator has exclusive jurisdiction to "resolve any conflicts" and to determine who "should be believed" (Resp. Br. 33) that marks the sharp difference between ordinary rule-making in non-controversial matters and the quasi-judicial nature of this adversary proceeding. Where credibility of witnesses is involved clearly there should be dispassionate and objective evaluation of their evidence. Cf. *Smith v. Dental Products Co.* (C.C.A. 7, 1948) 168 F. 2d 516, 518-19.

The problem was recognized in a related Food and Drug case, *United States v. Lord-Mott Co.* (D.C. Md., 1944) 57 F. (Supp.) 128, 132, in which the

court rejected the dominant weight which the Administrator had given to its own witnesses. It said:

> "The testimony is not all to that effect, and due credence must be given to the opposing testimony of the witnesses for the Government. But the court cannot blink the fact that they are naturally interested, or biased, in seeing that their work or the work of their associates in this matter is upheld, and when such *highly qualified witnesses* as the head of the Horticultural Department of the University of Maryland and the Executive Secretary of the Tri-State Packers Association testify, as they did, (on behalf of industry) * * * the Court feels that their testimony must be given greater weight than the testimony of the Government's witnesses."

An identical parallel exists here. Controlling weight is given to the testimony and "opinion" of Mr. Callaway, the Administrator's enforcement officer. The findings of fact in both final orders rejected the testimony of petitioner and of "highly qualified witnesses," including Dr. Trevor Kincaid, Chairman of the Department of Zoology, University of Washington; Dr. Ray W. Clough, Chemist and Ass't. Director, Northwest Branch, National Canners Association; and Dr. David B. Charlton, owner and director of Charlton Laboratories of Portland, Oregon; and a competent and unbiased panel of food experts. The qualifications of all these witnesses are set forth in detail in the record and are summarized in the Index (Pet. Op. Br. xii, xiv, xv).

VI. RESPONDENTS HAVE IGNORED STATUTORY AND JUDICIAL REQUIREMENTS FOR FAIR PROCEDURE.

1. This brings us to respondents' defense "that the orders were made in careful observance of the procedural safeguards provided by law" (Resp. Br. 46-70).

Respondents first note but brush aside the detailed matters of record, showing the lack of observance of procedure required by law (Spec. Nos. 1, 2, 3(a) to (e), 4(a) to (e), 5(a) to (m), Pet. Op. Br. 45-54, 75-90). They take refuge in denying that the *Morgan* cases are applicable, and in stating that administrative rule-making protects them from judicial review of procedural due process.

First, contrary to respondents' assertions, the *Morgan* cases are definitely and specifically rule-making. They involve "the approval or prescription for the future of rates." In *St. Joseph Stock Yard Co. v. U. S.*, 298 U.S. 38, 42 (1936), the court enunciated the familiar principle that:

> "Rate making, of course, is a legislative process."

The *Morgan* cases involve identical considerations where Secretary Wallace was restrained from enforcing an order:

> "fixing the maximum *rates to be charged.*"

298 U.S. 468, 471.

Second, Congress, in enacting the Administrative Procedure Act, in Section 2(c), expressly defined "rule-making" as including:

> "the approval or prescription for the future of rates * * *."

It must follow, therefore, by either test, that the *Morgan* cases are applicable to the present case, which respondents term "rule-making".

2. Respondents contend that Section 5(c) of the Administrative Procedure Act has no application, relying on portions of the text of the Senate Committee Report (Resp. Br. 55). Petitioner also relies likewise on that text (Pet. Op. Br. 84), and respectfully submits that any fair reading of the Committee Report confirms petitioner's construction of Congressional

intent exactly as shown (Pet. Op. Br. 84-5). If further confirmation be needed that Congress intended that all agencies, including the Food and Drug Administration, observe judicial due process where sharply contested issues of fact exist, it is found in the broad language of Senator McCarran's parallel statement. He said, in reporting the bill to the Senate:

> "The exemption of rule making and determining applications for licenses, from provisions of sections 5(c), 7(c), and 8(a) may require change if, in practice, it develops that they are too broad. The committee believes it has followed sound discretion in selection of the language used, and *it is the feeling of the committee that, where cases present* **sharply contested issues of fact,** *agencies should not as a matter of good practice take advantage of the exemptions.*"[7]

3. Respondents cite from the Attorney General's Manual, p. 15, but omit to cite p. 13 and 14 which recognize the overlapping definitions of rule-making, order, and licensing, and states that the definitions:

> "leave many questions as to whether particular proceedings are *rule-making* or *adjudication*" (p. 13),

and that:

> "Typically, *the issues* (*in rule-making*) *relate not to* the *evidentiary facts*, as to which the *veracity* and demeanor *of witnesses* would often be important, *but* rather *to* the *policy-making conclusions* to be drawn from the facts." (p. 14)

This case is not such "typical" rule-making. In this case unlike non-controversial rule-making, respondents acknowledge that the determination of "evidentiary facts", including credibility of witnesses, is the controlling issue (Resp. Br. 33).

The difficulty with respondents' contention that the

[7]Administrative Procedure Act, Legislative History, 79th Cong., S. Doc. 248, pp. 324-5.

Administrator should "resolve any conflicts in the evidence and * * * decide * * * (which) witnesses * * * should be believed" is that it does not square with the facts. The "resolving", "deciding" and "believing" were accomplished *ex parte* not by the Administrator, but by his witness who gave the very "conflicting testimony" in issue, and by his counsel who advocated it. These gentlemen (whose personal integrity is not questioned) are of necessity disabled from subsequently evaluating dispassionately such a conflict with themselves.

4. If any case requires a dispassionate and nonbiased judgment, it is this one. It presents substantial economic conflicts as to petitioner and other Western packers on the one hand and as to the Administrator and Southern packers on the other. It began before the proceeding was even started, or before any evidence was taken, with an unwarranted and prejudged implication by the Administrator that Western packers were unlawfully adulterating or misbranding their products (Pet. Op. Br. 28). It began because of "violent complaint" of Southern packers (Callaway, R. 64). Realism requires a recognition of the struggle. In *St. Joseph Stock Yards v. U. S.*, 298 U.S. 38, 52 (1936), Chief Justice Hughes said:

> "* * * Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient."

And Mr. Justice Brandeis and his brethren concurred, at page 73:

> "* * * The inexorable safeguard which the due process clause assures is * * * that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be con-

ducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."

5. Respondents contend that petitioner's case is based on "inferential arguments", quoting from the *Cupples* case (Resp. Br. 50). But respondents omitted (without indicating asterisks) two significant sentences of that quoted text reading:

> "Here there is no allegation that there was no study and consideration of the record. On the contrary, it affirmatively appears that the subordinates did what the first *Morgan* case said they might do. Every presumption of regularity attends the action of the Board."
>
> *Cupples Co. v. N. L. R. B.* (C.C.A. 8, 1939), 103 F. 2d. 953, 958.

Contrast that with the situation here. *Here* there are allegations based on the record which shows that the two respondents did not conscientiously read or consider all of the evidence (Pet. Op. Br. 45-6, 76-8). *Here* it affirmatively appears that the subordinates did not comply with the *Morgan* case. *Here* there is cross-examination and an interrupted and rejected offer of proof to show that the orders were prepared by respondents' adverse witness and by respondents' opposing attorney. *Here* there can be no presumption of regularity. *Here* there is an unconscionable and unlawful departure from the "rudiments of fair play" in combining judge, jury, prosecutor and prosecuting witness, and in permitting them *ex parte* to make a "choice" based on which witnesses "should be believed".

6. Respondents contend that there was no error in denying such cross-examination and in refusing an offer of proof with respect to the foregoing.

If the Congressional and judicial statements of fun-

damental fairness are sound and are to be preserved, it must be obvious that facts of this nature can only be ascertained by cross-examination and offer of proof. *Powhatan Mining Co. v. Ickes*, 118 F. 2d. 105, 110 (C.C.A. 6, 1941).

7. Respondents cite the *Inland Steel Case*, 105 F. 2d. 246 (C.C.A. 7, 1939) (Resp. Br. 50). But in a subsequent phase of that same case, *Inland Steel Co. v. N. L. R. B.*, 109 F.2d 9, 20 (C.C.A. 7, 1940), the same court reversed an order of the Board on grounds parallel to those alleged here. It quoted with approval a New York state case, holding:

> "* * * *The first idea in the administration of justice * * * is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice.*"

Much of this case turns on "choice" of evidence and which witnesses "should be believed". No reflection whatsoever is suggested as to the personal integrity of the gentlemen involved. But it is respectfully insisted that where the same witness who testifies subsequently evaluates the probity of his own testimony, as contrasted with conflicting testimony by others, this is too great a strain on the:

> "inclination of the human mind to attach more importance to its own statements than to those of others." *Maitland v. Zanga*, 14 Wash. 92 (1896)

It denies the "rudiments of fair play" (Pet. Op. Br. 85-90).

8. Respondents contend that adherence to these legal requirements would "effectively stop the administrative process" (Resp. Br. 51). This is error. No change whatever is required. The Administrative Procedure Act, §11, 5 U.S.C.A. 1010, provides for per-

manent appointment of "qualified and competent" examiners, or as used here, Presiding Officers. Presiding Officers, like courts, acquire "expertness" through participation and study in particular fields. Their tenure is secure, freed from political pressures. Competent Presiding Officers, like courts, are qualified to hear conflicting testimony and to decide which witnesses "should be believed" without being guided, in writing the findings, by the *ex parte* aid of one of the parties litigant.

CONCLUSION

Petitioner has shown that the First and Second Final Orders are not in accordance with law and void because they are: (a) made without observance of the procedure required by law; (b) unsupported by substantial evidence; (c) in excess of statutory jurisdiction; (d) arbitrary, capricious, and an abuse of discretion; and finally (e) contrary to constitutional right.

It is respectfully submitted that petitioner's prayer should be granted for an order permanently setting aside and annulling and perpetually enjoining the First Final Order of the Administrator, and the Second Final Order of the Acting Administrator, dated, respectively, March 10, 1948, and August 3, 1948, entitled "Docket No. FDC-50, *In the Matter of Establishing Definitions and Standards of Identity and Amending the Standard of Fill of Container for Canned Oysters.*"

Respectfully submitted,

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